Fitting *International Shoe* to Jurisdiction Over Property: *Shaffer v. Heitner*

The century-old doctrine of *Pennoyer v. Neff*[1] has been displaced. *Pennoyer* predicated the adjudicatory authority of a court on the jurisdiction's power over property within its territorial boundaries. In *Shaffer v. Heitner*,[2] however, the Supreme Court of the United States declared that "the presence of property in a State does not automatically confer jurisdiction over the owner's interest in that property,"[3] thereby rejecting the fiction that property has a legal status apart from the interests of persons who claim or control it. *Shaffer* proclaimed a single, unified standard of fourteenth amendment due process: "[A]ll assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[4]

The jurisdictional dispute in *Shaffer* was unusual; plaintiff had attempted to compel defendants to appear by causing the Delaware court to seize defendants' intangible property that was present in the state only constructively by operation of statute.[5] Yet that specialized assertion of jurisdiction quasi in rem, exemplifying a broad and significant category of jurisdiction based on the presence of property in the forum, afforded the Court an opportunity to announce a comprehensive jurisdictional theory.

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1. 95 U.S. 714 (1877).
2. 433 U.S. 186 (1977).
3. *Id.* at 211.
4. *Id.* at 212.
5. Plaintiff brought a shareholder's derivative suit in Delaware against Greyhound, a Delaware corporation with its principal place of business in Arizona, a wholly owned Greyhound subsidiary, and twenty-eight present or former officers and directors whose alleged breach of duty had exposed the two corporations to antitrust damages and criminal contempt fines approaching fourteen million dollars. Simultaneously plaintiff filed a motion for sequestration of the Delaware property of the individual defendants. Pursuant to the Delaware sequestration statute, DEL. CODE tit. 10, § 366 (1974), shares of Greyhound stock and options belonging to twenty-one of the defendants were "seized" by placing "stop transfers" orders on the books of Greyhound. Although none of the stock certificates were physically present in Delaware, the stock was considered constructively present by virtue of a statute, DEL. CODE tit. 8, § 169 (1974), that makes Delaware the situs of ownership of all stock in Delaware corporations.

Sequestration is expressly intended to compel a nonresident to appear and defend a suit in equity. It is not a security device; if the defendant enters a general appearance, the sequestered property is routinely released. If the defendant defaults, the property is sold and the proceeds applied in satisfaction of the plaintiff's claim. The Delaware statute embraces any and all property of the nonresident defendant.

Defendants whose property had been sequestered entered a special appearance to quash service, asserting *inter alia* that they lacked sufficient contacts with Delaware to be subject to its jurisdiction consistent with the principles of International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Delaware courts sustained jurisdiction quasi in rem based on the statutory presence of the stock in Delaware. The United States Supreme Court, in an opinion by Justice Marshall, reversed. Shaffer v. Heitner, 433 U.S. 186, 195 (1977).

This Case Comment demonstrates that the *Shaffer* Court intended the new, plenary jurisdictional standard to be the in personam "minimum contacts" standard of *International Shoe Co. v. Washington*[6] and *Hanson v. Denckla.*[7] Application of the "minimum contacts" standard, however, threatens the very existence of major categories of state court jurisdiction that the Court could not have meant to discard, such as trust adjudication and probate. The writer suggests an interpretation of *Shaffer* that preserves the vitality of the Court's expansive new doctrine of fairness yet accommodates indispensable exercises of state court jurisdiction.

I. THE HISTORICAL FOUNDATION FOR *Shaffer*

An analysis of *Shaffer* necessarily commences with *Pennoyer v. Neff.*[8] Its "principles, and corollaries derived from them, became the basic elements of the constitutional doctrine governing state court jurisdiction."[9] Neff, a nonresident, was sued in Oregon by Mitchell to recover attorney's fees. Notice was published in local newspapers but personal service was not made. After a default judgment was entered, Neff's Oregon property was seized and sold to satisfy the judgment. Neff, asserting that the prior judgment and sale were invalid, then sued Pennoyer, the purchaser at the execution sale, to recover the property.

Justice Field, writing for the Court in *Pennoyer*, declared "two well-established principles of public law respecting the jurisdiction of an independent State over persons and property."[10] The first principle was "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; the second, "that no State can exercise direct jurisdiction and authority over persons or property without its territory."[11]

In *Pennoyer* Oregon's jurisdiction ultimately failed because the nonresident defendant had neither been personally served with process in Oregon nor consented to jurisdiction there;[12] nor had defendant's Oregon property been seized by order of the court at the commencement of the action. Thus, the Oregon court lacked physical power over the person or the property of the defendant within its territorial limits and could not adjudicate the controversy.

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6. 326 U.S. 310 (1945).

7. 357 U.S. 235 (1958).

8. 95 U.S. 714 (1877).

9. Shaffer v. Heitner, 433 U.S. 186, 198-99 (1977).

10. 95 U.S. at 722.

11. *Id.*

12. Today, the facts of *Pennoyer* would support jurisdiction in personam under a long arm statute since defendant had allegedly incurred the disputed contractual obligation in the forum state. *See, e.g.*, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1968 & Supp. 1978).

One crucial result of *Pennoyer*, carefully nurtured and vigorously employed during the past century, was that formal attachment of the nonresident defendant's property present within the forum permitted the courts of the forum to adjudicate any controversy the defendant might be called to defend, whether or not the controversy bore any relationship to the seized property, or even to the forum state. A judgment in an action based on property was, however, limited to the value of the property seized.[13]

The *Pennoyer* concept of jurisdiction, based on the physical power of the sovereign states, is reflected in the traditional vocabulary of jurisdiction and judgments:

> If . . . jurisdiction is based on . . . authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem."[14]

The distinctions among actions in rem and actions quasi in rem are that:

> A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. [Judgments quasi in rem are] of two types. In [the first type] the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the [second type] the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.[15]

It is important to review the historical context of *Pennoyer* and the social policies its theory served.[16] In the words of Professor Hazard, "[i]t is notorious that we are a mobile population, and we have been such since the beginning . . . . The vastness and richness of the land has made wide-ranging economic adventure attractive. And this, too, has been true since the beginning of our history."[17] That mobility, however, has not been universal; unlimited personal travel was, and is, a privilege of the few. By 1877, the year *Pennoyer* was

13. *Shaffer* retains the limitation on liability. 433 U.S. at 207 n.23, 209 n.32.

14. *Id.* at 199.

15. *Id.* at 199 n.17 (*quoting* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) (*citing* RESTATEMENT OF JUDGMENTS 5-9 (1942)).

This paper will use the abbreviations "quasi in rem I" and "quasi in rem II" to refer to the two types of actions quasi in rem. Although the *Shaffer* Court deliberately used "in rem" to mean "in rem and quasi in rem," the distinctions are exceedingly important and will be maintained. The jurisdiction sought to be asserted in *Shaffer* was quasi in rem II, although the Delaware statute was expressly designed to coerce a defendant's general appearance with full personal liability.

16. "[T]he merits of rules of adjudicatory authority depend on the extent to which they further the policies to be served . . . ." Smit, *The Enduring Utility of in Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOKLYN L. REV. 600, 606 (1977).

17. Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 246.

decided, the availability of transcontinental rail travel had widened the gap between the mobile minority and the stationary majority. Transient persons could more easily venture from, say, New Jersey to Oregon, purchase property there, incur debt, and depart. Few Oregon creditors, however, given the state of communications in 1877, could pursue their debtors to distant courts.

When the *Pennoyer* Court condoned quasi in rem actions by resident plaintiffs,[18] it was attempting a practical solution to this problem. The Court was not indifferent to considerations of fairness in 1877; the *Pennoyer* Court must implicitly have determined that, on balance, the utility and fairness of automatic property-based jurisdiction outweighed its unfairness to defendants. Without quasi in rem II jurisdiction many tort plaintiffs might have been denied any practical opportunity to obtain even partial satisfaction of claims against transient defendants. Without quasi in rem I jurisdiction to determine ownership of real property within the forum, the alienability of land and its consequent economic development would have been impeded significantly.

This explanation admittedly does not accommodate *Pennoyer*'s unfortunate offspring, *Harris v. Balk*.[19] Harris, a resident of North Carolina, owed a debt to Balk, also a resident of North Carolina. Balk, in turn, owed a debt to Epstein, a resident of Maryland. When Harris visited Maryland he was personally served with a writ of attachment garnishing his debt to Balk. A default judgment was entered against Balk and Harris paid Epstein. Balk then sued in North Carolina to recover the debt owed him by Harris. The Court ruled

18. "[T]he State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its *own citizens* against them . . . ." Pennoyer v. Neff, 95 U.S. 714, 723 (1877) (emphasis added). Notwithstanding this language, quasi in rem jurisdiction has seldom been restricted to resident plaintiffs.

19. 198 U.S. 215 (1905). *Harris* in turn spawned the contemporary doctrine of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The *Seider* plaintiffs, residents of New York, had been injured in a Vermont automobile accident through the alleged negligence of defendant, a Canadian resident. Quasi in rem jurisdiction was obtained in New York by attachment of the obligation of defendant's insurer, a Connecticut company with New York offices, to defend and indemnify him. *Seider* is a controversial decision that has not been widely followed. *See, e.g.*, Javorek v. Superior Court, 17 Cal. 3d 529, 552 P.2d 728 131 Cal. Rptr. 768 (1976); Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N.Y.U. L. Rev. 1075 (1968); Comment, *Jurisdiction in Rem and the Attachment of Intangibles: Erosion of the Power Theory*, 1968 Duke L.J. 725.

The constitutionality of the *Seider* procedure was upheld, on the basis of *Harris*, in Simpson v. Loehmann, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967), and in Minichiello v. Rosenberg, 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing en banc*, 410 F.2d 117, *cert. denied*, 396 U.S. 844 (1969). This procedure is available only to New York resident plaintiffs, or nonresidents injured in accidents in New York. Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir. 1969), *cert. denied*, 396 U.S. 840 (1969). Recovery may not exceed the liability limits of the policy. Soon after *Shaffer* was decided a New York federal district court allowed a *Seider* attachment. O'Connor v. Lee-Hy Paving Corp., 46 U.S.L.W. 2184 (E.D.N.Y. Sept. 27, 1977). Only weeks later a New York state court rejected the doctrine in light of *Shaffer*. Katz v. Umansky, 399 N.Y.S.2d 412 (1977). The latter result is probably correct, given that *Harris*, from which *Seider* took constitutional justification, is the only case clearly overruled by *Shaffer*, 433 U.S. at 212 n.39.

that the Maryland judgment must be given full faith and credit by the North Carolina court; Harris' payment to Epstein discharged his debt to Balk. In the *Shaffer* Court's analysis, "the debt Harris owed Balk was an intangible form of property belonging to Balk, and . . . the location of that property traveled with the debtor. By obtaining personal jurisdiction over Harris, Epstein had 'arrested' his debt to Balk . . . and brought it into the Maryland court."[20]

Even though the debt owed the nonresident defendant, Balk, by the garnishee, Harris, was undisputed, the defendant had been subjected to jurisdiction in a forum where, but for the debtor's peregrinations beyond the defendant's control, the defendant had no property, let alone personal affiliations. Epstein's surveillance of Balk's affairs must have been quite keen to follow the activities of Harris, Balk's debtor. Thus, it seems Epstein would have suffered little hardship had he been forced to bring an in personam action against Balk in North Carolina, a forum easily accessible from Maryland by rail at the time.

Harris notwithstanding, the *Pennoyer* territorial rationale, invoking power over either the person or his property within the forum, was a reasonably effective device for its era. Perhaps a different scheme might have served equally well in 1877 and have aged more gracefully, but the point is that the *Pennoyer* rules evolved in historical context to meet the needs of the developing nation. When the need for the doctrine had been lessened by modern developments in transportation and communication,[21] the unfairness of some aspects of the *Pennoyer* rules, especially the *Harris* outcropping, could begin to be acknowledged without creating an insoluble dilemma for the legal system.

While the *Pennoyer* scheme for property-based jurisdiction persisted essentially unaltered until *Shaffer*, the acknowledgment of *Pennoyer's* unfairness began in the context of personal jurisdiction. Initially in personam jurisdiction expanded markedly within the constraints of the *Pennoyer* power rationale.[22] *Pennoyer* had

> approved the practice of considering a foreign corporation doing business in a State to have consented to being sued in that State. . . . This basis for *in personam* jurisdiction . . . was later supplemented by the doctrine that a corporation doing business in a State could be deemed "present" . . . and so subject to service of process under the rule of *Pennoyer*.[23]

Similarly, jurisdiction over nonresident motorists who had caused

20. Shaffer v. Heitner, 433 U.S. 186, 200 (1977).

21. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 251 (1958).

22. *See, e.g.*, Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—from* Pennoyer *to* Denckla: *A Review*, 25 U. CHI. L. REV. 569 (1958).

23. Shaffer v. Heitner, 433 U.S. 186, 201-02 (1977) (citations deleted).

injury within the forum was sanctioned "by use of a legal fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered":[24] constructive appointment by the motorist of a state official as his process agent.[25]

The policy considerations underlying these developments parallel those previously suggested for permitting jurisdiction quasi in rem. It defeated important objectives of the legal system to require the local plaintiff injured in the conduct of his local activities to pursue the transient defendant to a distant forum and undergo the difficulties of conducting litigation at remove. Expanded jurisdiction in personam was necessary even though in rem and quasi in rem jurisdiction were fully operative. A nonresident defendant might own no property in the forum where the events leading to litigation occurred, or might own property in the forum whose value was far too low to satisfy a judgment for the plaintiff.

Finally, in *International Shoe Co. v. Washington*,[26] the Court set aside the historical basis of in personam jurisdiction, power over the defendant's person.

> But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[27]

The Court found that the International Shoe Company was subject to the judicial and taxing jurisdiction of the State of Washington because the corporation had "such contacts . . . with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit . . . ."[28] The Court rejected mechanical or quantitative determinations of reasonableness:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.[29]

In the words of the *Shaffer* Court, after *International Shoe* "the relationship among the defendant, the forum, and the litigation,

24. *Id.* at 202.
25. Hess v. Pawloski, 274 U.S. 352 (1927).
26. 326 U.S. 310 (1945).
27. *Id.* at 316, *quoted in* Shaffer v. Heitner, 433 U.S. 186, 203 (1977).
28. *Id.* at 317, *quoted in* Shaffer v. Heitner, 433 U.S. 186, 203 (1977).
29. *Id.* at 319, *quoted in* Shaffer v. Heitner, 433 U.S. 186, 204, 216 (1977).

rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction."[30]

State legislatures, taking their lead from the suggestion in *International Shoe* that even a single act of sufficient gravity might subject a nonresident to suit in the forum,[31] enacted "long arm" statutes authorizing in personam jurisdiction over nonresidents.[32] Typically, these statutes asserted jurisdiction when the nonresident defendant was alleged to have committed a tort in the forum state or to have entered into a contract or a transaction involving real property there. When the defendant was an individual it was usually clear that he himself, or his actual agent,[33] had been directly involved with the plaintiff. But when the defendant was a corporation and the plaintiff an individual of modest means, attenuated contacts of the nonresident defendant were sometimes found to satisfy the requirements of *International Shoe*.[34]

As the language previously quoted from *International Shoe* indicates, and as *Shaffer* reiterated, it is a threshhold requirement for personal jurisdiction that there be contacts, ties or relations between the defendant and the forum.[35] Yet in *McGee v. International Life Insurance Co.* the Court held that it was "sufficient for purposes of due process that the suit was based on a *contract* which had substantial connection with [the forum] State."[36] The judgment that the Court upheld in *McGee* had been entered by a California court against a Texas insurance company whose sole contact with California had been to reinsure a California decedent who held a policy originally issued by the insurer's Arizona predecessor. The Court pointed out that

> California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small . . . individual claimants frequently could not afford the cost of bringing action in foreign forum—thus in effect making the company judgment proof.[37]

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30. 433 U.S. at 204.

31. 326 U.S. at 318.

32. *See, e.g.*, Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533.

33. *See, e.g.*, Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

34. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

35. *See* text accompanying notes 26-30 *supra*.

36. 355 U.S. 220, 223 (1957) (emphasis added).

37. *Id.*

The *McGee* Court dealt squarely with practical policy considerations, avoiding formal notions of defendant-forum contact. The contract, not the defendant, was asserted to possess the requisite connection with the forum.[38] The result seems intuitively fair. Given *McGee*, it appeared that a general inquiry into fairness—weighing the interests of the plaintiff, the defendant, and the forum—would be sufficient to satisfy the "minimum contacts" standard of *International Shoe*.

Just one year later, however, in *Hanson v. Denckla*,[39] the Court limited the expansion of state court jurisdiction in personam. Distinguishing *McGee* as a case whose "cause of action . . . arises out of an act done or transaction consummated in the forum State," the Court declared that

> [t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . . [I]t is essential . . . that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[40]

Hanson has been recognized as a persistent obstacle to in personam jurisdiction, although there has been disagreement about its nature and extent.[41] The Supreme Court has not spoken directly on

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38. One month before the Court's ruling in *McGee*, the California Supreme Court took a similarly pragmatic position. Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom.* Columbia Broadcasting Sys., Inc. v. Atkinson, 357 U.S. 569 (1958). The California court sustained jurisdiction quasi in rem over a New York trustee who, regardless of the sufficiency of his personal contacts with California, could not be subjected to an in personam judgment under the California jurisdictional statute then in force. Justice Traynor's opinion states that "in the case of . . . intangibles jurisdiction must be determined in the light of the totality of contacts with the state involved." 49 Cal. 2d at 347, 316 P.2d at 965. Since the action could not proceed without the trustee, the factors of fairness to the plaintiffs, fairness to the defendants already before the court, risk of exposing the obligor to multiple suits to enforce the same obligation, and "multiple contacts" with California were held to justify bringing the trustee before the California tribunal. The "multiple contacts" presumably linked the *litigation* and the *other parties* to California, since the court declined to consider whether long-arm jurisdiction over the trustee would have been constitutional. Perhaps the United States Supreme Court was acknowledging fundamental fairness rather than relying on the traditional power rationale of quasi in rem jurisdiction when it denied certiorari to Atkinson immediately after it had decided Hanson v. Denckla, 357 U.S. 235 (1958).

39. 357 U.S. 235 (1958). *Hanson* was a complex case; its facts and the tortuous reasoning by which the Court reached a fair result are set forth and criticized by Professor Hazard. Hazard, *supra* note 17, at 243. For present purposes it suffices to say that the *Hanson* Court held that due process would be denied if Florida were allowed to assert in personam jurisdiction over the Delaware corporate trustee of a trust created in Delaware whose settlor had removed to Florida, where she subsequently died. The *Pennoyer* territorial power theory reemerged in *Hanson*, 357 U.S. at 251, to be summarily disclaimed by the Court in *Shaffer*, 433 U.S. at 204 n.20.

40. 357 U.S. at 253 (emphasis added).

41. *See, e.g.*, Casad, Shaffer v. Heitner: *An End to Ambivalence in Jurisdiction Theory?*, 26 KAN. L. REV. 61 (1977); Kurland, *supra* note 22; Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300 (1970).

in personam jurisdiction since it decided *Hanson*;[42] for twenty years the contours of in personam jurisdiction have been shaped exclusively by the state and lower federal courts.

Some of the lower courts skirted the *Hanson* barrier, adroitly pursuing the policy objectives implicit in *International Shoe* and expressed in *McGee*. Their efforts to extend in personam jurisdiction were most successful when resident consumers or workers who had sustained injury from defective products were allowed to bring suit at home against foreign corporate manufacturers who transacted no business directly in the forum. In *Gray v. American Radiator & Standard Sanitary Corp.*[43] jurisdiction was sustained in Illinois over a foreign corporation that had produced a defective safety valve installed in a water heater that exploded, injuring the resident plaintiff. The Ohio defendant transacted no business in Illinois; it sold the finished valves to the Pennsylvania manufacturer of the water heaters. The Illinois Supreme Court, in reconciling the case with *Hanson*, addressed directly the economic and social policy issues:

> [I]t is a reasonable inference that [the defendant's] commercial transactions, like those of other manufacturers, result in substantial use and consumption in this State . . . .
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> With the increasing specialization of commercial activity and the growing interdependence of business enterprises it is seldom that a manufacturer deals directly with consumers in other States. The fact that the benefit he derives from its laws is an indirect one, however, does not make it any the less essential to the conduct of his business; and it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here.
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> As a general proposition, if a corporation elects to sell its products for ultimate use in another State, it is not unjust to hold it answerable there for any damage caused by defects in those products.[44]

The California high court, confronted with a similar case, adopted the Illinois approach and declared: "Only if isolated use or purchase conclusively establishes lack of foreseeability that the product will enter the state is the isolation necessarily fatal to jurisdiction over the manufacturer; in that event there is a manifest lack of purposeful activity on the part of the manufacturer."[45]

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42. The Court has, however, considered questions of due process related to property-based jurisdiction. Texas v. New Jersey, 379 U.S. 674 (1965); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). The Court has also spoken on significant issues of procedural due process. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

43. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

44. *Id.* at 442, 176 N.E.2d at 766.

45. Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 904, 458 P.2d 57, 65, 80 Cal. Rptr. 113, 121 (1969).

The foregoing discussion sketches the state of jurisdictional affairs immediately preceding *Shaffer*. In the three decades since *International Shoe*, jurisdiction in personam had become relatively well defined. The traditional rules of jurisdiction quasi in rem II had been attacked persistently by lower courts and commentators as unfair and outmoded.[46] At long last, "the time [was] ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam*."[47]

II. MINIMUM CONTACTS BECOMES THE PLENARY STANDARD

A. *The Court Extends the In Personam Standard to In Rem Jurisdiction*

In Part III of his opinion for the *Shaffer* majority, Justice Marshall made "[t]he case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam."[48] He reasoned that "jurisdiction over a thing" is equivalent to "jurisdiction over the interests of persons in a thing"; to assert jurisdiction in rem there must exist a sufficient basis to assert jurisdiction over the interests of persons.[49] He concluded that the "standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the *minimum contacts* standard elucidated in *International Shoe*."[50]

The *Shaffer* Court conceded that "the presence of property in a State may bear upon the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation."[51] Justice Marshall listed several factors that may affect the decision, but warned that the list was neither exhaustive nor necessarily decisive.[52]

The Court then raised and rebutted the arguments against applying the *International Shoe* test to the class of actions quasi in rem II, such as *Harris* and *Shaffer*, which would be most radically affected by the decision. The Court found no merit in the argument that making the presence of property a sufficient basis for jurisdiction precludes a wrongdoer from removing his assets to a forum where he is not vulnerable to suit in personam. The defendant might have relocated

46. *See, e.g.*, cases and articles cited in Shaffer v. Heitner, 433 U.S. at 205. Both the courts and the commentators have aimed their criticism mainly at quasi in rem II jurisdiction, although Justice Marshall's opinion intimated a groundswell of dissatisfaction with property-based jurisdiction generally.

47. 433 U.S. at 206.

48. *Id.* at 207.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.*

52. *Id.* at 208 n.28.

his assets innocently, without motive to evade jurisdiction. And even a devious defendant could not escape eventual justice merely by placing his property in a forum in which the plaintiff could not obtain personal jurisdiction: "The Full Faith and Credit Clause . . . makes the valid *in personam* judgment of one State enforceable in all other States."[53] "At most," said the Court, this argument "suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*."[54]

The Court briefly contemplated and rejected jurisdictional certainty and historical tradition as justifications for jurisdiction premised solely on the presence of property in the forum, concluding "that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[55] It seems evident that the Court contemplated as its standard minimum contacts with the *Hanson* purposiveness requirement appended, not the broader concept, "fair play and substantial justice."[56] The interpretation of *Shaffer* to be offered in this paper does not vitiate Justice Marshall's logic, but does suggest a more limited application for his conclusion.

B. *Has* Shaffer *Altered the Standard for In Personam Jurisdiction?*

Since the standards that govern in personam jurisdiction are now to govern state court jurisdiction generally, one might legitimately inquire whether *Shaffer* abridges the scope of in personam jurisdiction over nonresidents. In applying its new rule to the facts of the case,[57] the *Shaffer* Court held that defendants' sequestered stock, constructively present in Delaware, did not provide contacts with that state sufficient to support jurisdiction in a shareholder's derivative suit unrelated to the sequestered property. Speaking for the majority, Justice Marshall explored other possible bases[58] for Delaware jurisdic-

53. *Id.* at 210.

54. *Id.* Carolina Power & Light Co. v. Uranex, 46 U.S.L.W. 2194 (N.D. Cal. Sept. 26, 1977), decided after *Shaffer*, upheld attachment in California of an $85,000,000 debt owed the French corporate defendant by a California corporation, as security for arbitration pending in New York, a forum with which defendants had sufficient contacts to satisfy *International Shoe*. Although the debt, defendant's sole asset in the United States, bore no relation to the matters under arbitration, defendant had agreed to litigate in California any disputes arising out of the debtor-creditor relationship.

55. *Id.* at 212.

56. *See* text accompanying notes 48-50 *supra* and notes 75-78 *infra*.

57. The facts are set forth in note 5 *supra*. The jurisdiction sought to be exercised in *Shaffer* was quasi in rem II, which must now meet the minimum contacts standard.

58. Justice Brennan approved the Court's extension of *International Shoe* principles to jurisdiction based on property, but roundly condemned the majority's examination of alternative

tion over these directors and officers, in dicta that may augur a newly restrictive approach to personal jurisdiction. Justice Marshall's analysis is not consonant with two decades of lower court decisions and commentary that had interpreted *Hanson* expansively and favored a convergence of the principles of jurisdiction with the principles of choice of law.[59]

The *Shaffer* majority could discern no alternative foundation for jurisdiction of the Delaware courts over these defendants, who had performed no acts in Delaware.[60] Delaware's interest in the conduct of officers of its domestic corporations might support the application of Delaware law to the controversy but did not make Delaware a fair forum for the litigation.[61] Similarly, defendants' acceptance of directorships

> establishes only that it is appropriate for Delaware law to govern. . . . It does not demonstrate that appellants have "purposefully avail[ed themselves] of the privilege of conducting activities within the forum State," *Hanson v. Denckla* . . . in a way that would justify bringing them before a Delaware tribunal. Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court.[62]

Justice Brennan, dissenting from this aspect of the majority opinion, argued with conviction that inquiries into jurisdiction and choice of law should not be sundered:

> [A] derivative action which raises allegations of abuses of the basic management of an institution whose existence is created by the State and whose powers and duties are defined by state law fundamentally implicates the public policies of that forum.
>
> . . . [T]he decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy.[63]

Justice Brennan rejected as indecisive the fact that defendants had not been shown to have entered or acted in Delaware. As for expectations of jurisdiction, these defendants

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grounds for jurisdiction as an impermissible advisory opinion. 433 U.S. at 220 (Brennan, J., concurring and dissenting). He would have remanded to allow the Delaware courts to reinterpret the challenged statute in light of the new rule. The Court's search for an alternative basis might be viewed less harshly as an invitation to state courts to construe their existing in rem and quasi in rem rules as conferring competence to adjudicate under the new standard, in order to avoid a chaotic transition.

59. *See, e.g.*, St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966); Buckeye Boiler Co. v. Superior Court, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Smit, *supra* note 16; Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

60. 433 U.S. at 213.

61. *Id.* at 215.

62. *Id.* at 216.

63. *Id.* at 224-25 (Brennan, J., concurring and dissenting).

> might be fairly charged with the understanding that Delaware would decide to protect its substantial interests through its own courts, for they certainly realized that in the past the sequestration law has been employed primarily as a means of securing the appearance of corporate officials . . . . Even in the absence of . . . a statute [expressing the state's interest in controlling corporate fiduciaries], however, the close and special association between a state corporation and its managers should apprise the latter that the state may seek to offer a convenient forum for addressing claims of fiduciary breach of trust.[64]

The Court, as Justice Brennan intimated,[65] could readily have drawn an analogy between the shareholder's derivative action in *Shaffer* and the litigation in *Gray* and *McGee*. Just as an individual plaintiff may suffer particularized physical or economic injury at the hands of a nonresident, so may a domestic corporation suffer injury from its nonresident fiduciaries.

Regardless of whether *Shaffer* constricted the sphere of in personam jurisdiction, its further growth has apparently been curtailed. Ironically, that curtailment is coupled with a sweeping extension of the minimum contacts standard to all state court jurisdiction. *Shaffer* appears to insist on the *Hanson* purposiveness requirement, even when fairness and the defendant's actual convenience do not demand it. It is difficult, however, to interpret *Hanson* to accommodate *all* important, fair exercises of state court jurisdiction under the minimum contacts rubric. The difficulties become strikingly apparent when one considers *Mullane v. Central Hanover Bank and Trust Co.*[66]

III. *Mullane*: TAKING THE MEASURE OF *Shaffer*

Mullane v. Central Hanover Bank and Trust Co.[67] is pivotal to an understanding and interpretation of *Shaffer*. The central issue in *Mullane* was whether nonresident beneficiaries of a common trust fund could be served by publication in a proceeding to settle the accounts of the trustee. The appointed representative for the nonresident beneficiaries argued that jurisdiction was improper because the beneficiaries had not been personally served in what was assertedly an in personam[68] proceeding. The Court ruled that characterization of the action as in rem or in personam was irrelevant;[69] what mattered was

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64. *Id.* at 227 n.6 (Brennan, J., concurring and dissenting).

65. *Id.* at 226 (Brennan J., concurring and dissenting).

66. 339 U.S. 306 (1950).

67. *Id.*

68. The action is in personam with respect to the trustee, whose personal liability for management of the trust funds is at issue, but not with respect to the beneficiaries, yet the action is not in rem because the title or status of the trust res is not in dispute. Fraser, *Jurisdiction by Necessity—An Analysis of the* Mullane *Case*, 100 U. PA. L. REV. 305, 305-09 (1951).

69. 339 U.S. at 312.

whether the means of service was one reasonably calculated to give notice.[70]

The *Shaffer* Court cited *Mullane* favorably as a bellwether of the Court's discontent with traditional property rules. Justice Marshall identified *Mullane*'s imposition of more rigorous notice requirements as the basis for a sequence of cases "recogniz[ing], contrary to *Pennoyer*, that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court."[71] Further, *Mullane* held "that Fourteenth Amendment rights cannot depend on the classification of an action as *in rem* or *in personam*."[72] Thus, there is justification to conclude that the Court in deciding *Shaffer* did not intend to overrule the express approval of jurisdiction by the *Mullane* Court. As the Court announced in *Mullane*:

> [T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[73]

Taking as an initial premise that *Mullane* survives *Shaffer* intact, one may identify and perhaps resolve important conceptual difficulties of *Shaffer*. If *Mullane* stands unaltered, New York's assertion of jurisdiction over nonresident trust beneficiaries must either satisfy the minimum contacts standard articulated in *International Shoe* and refined in *Hanson*, or be exempted from the minimum contacts requirements. It is difficult to see how the nonresident beneficiaries in *Mullane* could be made to meet the full minimum contacts requirements without watering down that standard or resorting to fiction. The beneficiaries' claims upon the trust might be a contact with the forum state sufficient, under *International Shoe*, to support jurisdiction to adjudicate matters intimately related to those claims. There is, however, no way to assure that each nonresident beneficiary has "purposefully avail[ed] [him]self of the privilege of conducting activities within the forum State,"[74] since some of the beneficiaries may be unknown, others unborn.

The *Shaffer* Court showed no inclination to dilute the minimum contacts standard by selectively deleting the *Hanson* purposiveness requirement. To the contrary, the Court referred repeatedly to the

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70. *Id.* at 315.
71. 433 U.S. at 206.
72. *Id.*
73. 339 U.S. at 313.
74. Hanson v. Denckla, 357 U.S. 235, 253 (1958).

"same test"[75] and "single standard"[76] before concluding that "all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[77] As it applied this standard to the parties before it, the Court left little doubt that *Hanson* is preeminent among the "progeny";[78] failure of defendants to "purposefully avail" themselves of the Delaware forum expressly precluded jurisdiction in *Shaffer*.

One could argue that *Shaffer* tacitly sanctioned a two-tiered standard of minimum contacts under which some classes of defendants need not satisfy the *Hanson* criterion, *i.e.*, an expectation of receiving the benefits of the protection of state law.[79] Even that concession, which would weaken *Shaffer* considerably, cannot accommodate all exercises of state court jurisdiction. One distinctly awkward category, as the *Shaffer* Court acknowledges,[80] is personal status.

The Court has long declined to invade or curtail the plenary authority of the states over the status of their citizens. Speaking for the Court in *Pennoyer*, Justice Field indicated the depth and breadth of that authority:

> The jurisdiction which every State possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.[81]

An important category of status adjudication is divorce. Divorce jurisdiction is grounded in the state's profound interest in family relations. In *Williams v. North Carolina*[82] the Court spelled out some of the policy considerations that underlie the present practice of allowing a domiciliary of the forum to obtain an ex parte divorce from a nonresident spouse who lacks any past or present association with the forum.

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage rela-

75. 433 U.S. at 207.

76. *Id.* at 209.

77. *Id.* at 212.

78. Professor Casad shares this view: "[T]he way the [*Shaffer*] majority opinion analyzed the contacts, ties or relations between Delaware and the issues and parties in this shareholders' derivative suit strongly suggests that the majority is taking the physical contact approach of the *Hanson* majority rather than the broader fairness approach of *McGee*." Casad, *supra* note 41, at 77.

79. *See The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 155 n.17 (1977).

80. 433 U.S. at 201.

81. Pennoyer v. Neff, 95 U.S. 714, 734 (1877).

82. 317 U.S. 287 (1942).

> tion creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service . . . meet the requirements of due process.[83]

The *Williams* Court firmly rejected the historical view of divorce as a proceeding in rem; at the same time it emphasized that a divorce decree is more than an in personam judgment.[84] Despite the care the Court took in *Pennoyer* and *Williams* to segregate status from the in rem/in personam taxonomy, the effect of *Hanson* on ex parte divorce was problematic. Justice Traynor noted:

> State courts . . . are not free to take the initiative in abandoning consideration of *ex parte* divorces in terms of a fictional res. So long as they are thus constrained they must discourse in the jargon of in rem jurisdiction, albeit with dismay that realistic analysis is thus obscured. The constraint seems destined to continue. The Supreme Court's insistence in . . . *Hanson v. Denckla* that defendant must have some contact with the forum state compels resort to a fictional res when contact cannot otherwise be established.[85]

Although Justice Marshall offered reassurance that traditional status adjudication was not changed by *Hanson* or *Shaffer*,[86] an underlying conceptual uneasiness persists. If, as the *Shaffer* Court implies, such jurisdiction may continue to be asserted freely, it can be reconciled with the central reasoning of *Shaffer* only by looking beyond, not within, a minimum contacts standard.

Justice Traynor's concern transcended divorce jurisdiction; he urged more generally that courts should be "free to consider jurisdiction at the outset in the complex of the parties' contacts with the forum state, the interests of the state concerned in the outcome, and a prevading [*sic*] concept of fair play to all parties."[87] As the foregoing discussion indicates, pervasive fair play does not inevitably demand purposive contacts of the nonresident defendant with the forum state.

How, under *Shaffer*, shall the lower courts, and eventually the Supreme Court itself, deal with a case such as *Mullane*, and with other traditional exercises of fair and socially important state court jurisdiction, such as status, that cannot always satisfy the tests of minimum contacts and purposiveness? The simplest solution, and therefore

83. *Id.* at 298.
84. *Id.* at 297.
85. Traynor, *supra* note 59, at 661.
86. 433 U.S. at 208 n.30.
87. Traynor, *supra* note 59, at 660.

the one most likely to be applied, is to find such cases beyond the scope of *Shaffer*. This possibility is provided by *Shaffer* itself, in two capacious footnotes. In one footnote the Court expressly declined to consider "whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is available to the plaintiff."[88] In the other footnote the Court declined to "suggest that jurisdictional doctrines . . . such as the particularized rules governing adjudication of status, are inconsistent with the standard of fairness."[89]

Justice Marshall was scarcely obliged to draft his opinion to avoid all conceivable jurisdictional dilemmas. Yet, having spoken so broadly and forcefully, the Court might have anticipated that its rigorous imposition of the minimum contacts test, coupled with an invitation to make routine exceptions, might lead courts to tolerate the very unfairness *Shaffer* seeks to eliminate.[90] There will be great temptation to conduct business as usual;[91] in practice, a well-used exception tends to enlarge the rule.

The Court could resolve the difficulties *Shaffer* provoked by restricting the case to its facts.[92] The tenor of the Court's opinion, however, militates against such restriction. Even limitation of the new rule to actions quasi in rem II would appear to be foreclosed by the Court's express extension of the new standard to actions quasi in rem I.[93]

IV. A Proposed Resolution

This writer proposes a different approach to reconcile the deliberate breadth of *Shaffer* with the practical difficulty of applying a single uniform rule to state court jurisdiction. Two steps are required. First, as applied to the entirety of state court jurisdiction, "the standards set forth in *International Shoe* and its progeny"[94] should be interpreted as the standards of "fair play and substantial justice," including but not limited to "minimum contacts." Second, the Court's extension

88. 433 U.S. at 211 n.39.

89. *Id.* at 208 n.30.

90. *Id.* at 212.

91. *See, e.g.*, O'Connor v. Lee-Hy Paving Corp., 46 U.S.L.W. 2184 (E.D.N.Y. Sept. 27, 1977) (approving a *Seider* attachment); Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (permitting jurisdictional attachment quasi in rem II of the New York bank account of defendant in wrongful death action. Plaintiff's American decedent had died in Turkey, in an air crash; defendent airline did not operate in the United States and lacked sufficient contacts to sustain jurisdiction in personam in any American forum.).

92. "The unanimous *Shaffer* holding [is] that due process is denied when jurisdiction to adjudicate any controversy concerning a nonresident defendant, with judgment enforceable against any of his assets, is based on the statutory presence of his stock within the forum state . . . ." *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 157 (1977).

93. 433 U.S. at 207.

94. *Id.* at 212.

of the in personam "minimum contacts" standard should be specifically limited to jurisdiction quasi in rem, of both the first and second types; all other exercises of jurisdiction[95] must be fair and reasonable, but need not satisfy the combined requirements of *International Shoe* and *Hanson*.[96]

"Minimum contacts" as it has developed from *International Shoe*, is a complex concept; however, for all its flexibility, the minimum contacts test does not exhaust jurisdictional due process. The touchstone of due process is fairness and reasonableness. The overriding standard of due process proclaimed in *International Shoe* is "fair play and substantial justice," of which "minimum contacts" is but a subcategory, albeit one of signal importance. Thus, the proposed first step is conceptually supportable and serves the *Shaffer* Court's avowed purpose by imposing a universal standard upon state court jurisdiction.

Many interests and values might properly be weighed to determine whether a particular assertion of jurisdiction comports with "fair play and substantial justice." These include the defendant's affiliations with the forum, and his inconvenience at being required to litigate there; the plaintiff's affiliations with the forum, and his justification for employing its courts; and the state's interests in creating a forum for this controversy or class of controversies. In short, what has been termed an interest analysis[97] should be undertaken. Looking among the Court's own doctrines, these considerations resonate the broad transactional test of *McGee*.

Shaffer's abolition of automatic jurisdiction over property imposes a threshhold inquiry[98] into jurisdiction for all cases brought before a state tribunal. The Court has signaled its willingness to tolerate this "uncertainty inherent in the *International Shoe* standard." The uncertainty is no greater, and indeed may be less, when "fair play and substantial justice," rather than "minimum contacts" is taken to be the *International Shoe* standard. The character of the inquiry is similar under both tests, but under the broader fairness standard an excep-

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95. These other exercises of jurisdiction include true in rem actions and actions, such as adjudication of status or trusts, that elude the traditional in rem/quasi in rem/in personam taxonomy.

96. The *Shaffer* Court appears to have imposed those requirements uniformly upon state court jurisdiction. *See* text accompanying notes 48-50 *supra*.

97. *See, e.g.*, Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967); Smit, *supra* note 16; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128 (1966); *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909 (1960); Comment, *supra* note 41.

98. In the interests of fairness to the plaintiff, the jurisdictional inquiry should not be protracted. *See* Comment, *supra* note 41, at 318. For certain categories of judicial business, such as probate, the determination of fairness, once made, will generalize readily for subsequent litigation; other exercises of jurisdiction may demand more individualized and repeated inquiry.

tionally strong interest of the forum of the plaintiff may compensate for the defendant's acknowledged lack of purposive contact with the forum.

The second step, confining the minimum contacts standard to jurisdiction quasi in rem, would resolve the confusion created by the Court's announcement that "jurisdiction over many types of actions . . . now . . . brought *in rem* would not be affected by a holding that any assertion of state court jurisdiction must satisfy the *International Shoe* standard."[99] Contrary to the Court's statement, "true" in rem jurisdiction, along with jurisdiction in *Mullane*, is fatally affected by imposition of the minimum contacts standard.

The *Shaffer* Court has unquestionably retained the traditional forms of jurisdiction in rem, including "true" in rem and quasi in rem I and II. The traditional justification for these forms was thought to be the sovereign power of the state over property within its borders.[100] The Court, although rightly rejecting the historical rationale, apparently failed to perceive a crucial distinction between "true" in rem jurisdiction and jurisdiction quasi in rem I.[101] The distinction is this: A proceeding that bars unknown claimants to property is in rem, while an action that affects only the interests of designated persons is quasi in rem.[102] It follows, then, that "true" in rem actions inevitably adjudicate the potential claims of unknown persons who lack purposive contacts with the forum.

Quiet title actions and proceedings for forfeitures may be either in rem or quasi in rem, depending on whether the proceeding determines the interests of all persons in the property or determines the validity of the claim of certain specified persons.[103] Even an action to foreclose a mortgage, usually quasi in rem because the mortgagor is a known person, could be in rem if, by reason of the death of the mortgagor, the interests of unknown heirs must be considered in the adjudication.[104] A probate proceeding, however, is always in rem;[105] the probate court has jurisdiction over the decedent's estate for proceedings that affect the claims of *all* heirs, unknown as well as known.[106]

A significant portion of state court jurisdiction consists of in rem actions that cannot satisfy the minimum contacts standard of *Inter-*

99. 433 U.S. at 208.

100. *See* Pennoyer v. Neff, 95 U.S. 714 (1877).

101. *See* note 15 and accompanying text *supra.*

102. Fraser, *Actions in Rem*, 34 CORNELL L.Q. 29, 36 (1948).

103. *Id.*

104. *Id.*

105. *Id.*

106. In an intriguing proposal for ante-mortem probate, Professor Fink, reasoning from *McGee*, suggests that such proceedings could be made binding on nonresident beneficiaries and intestate successors because the will, as a transaction, would supply an adequate jurisdic-

national Shoe and *Hanson* but are consistent with fundamental fairness when the competing interests of the parties and the forum have been weighed. Surely the Court did not intend to preclude actions in rem; but just as surely, a literal reading of *Shaffer* yields no precise indication of how such actions are to be accommodated within the new standard.

Close examination of the text suggests that the *Shaffer* Court may inadvertently have blurred the important distinction between jurisdiction in rem and jurisdiction quasi in rem I as it considered application of the minimum contacts standard to property actions. Justice Marshall's language presumes a designated defendant whose "*claim* to property located in the State would normally indicate that he *expected* to benefit from the State's protection of his interest."[107] But an action in rem by definition includes unknown persons, potential defendants who make no active claim and have no expectation of benefits from the forum state. In the same paragraph Justice Marshall spoke of "claims to the property itself [as] the source of the underlying controversy between the plaintiff and the defendant."[108] Again, there is a strong presumption of designated parties; nevertheless, Justice Marshall asserted, in a footnote, that "[t]his category includes true *in rem* actions and the first type of *quasi in rem* proceedings.[109] Retreat from that assertion would not weaken the opinion, but would allay the justifiable fear of Justice Powell[110] and Justice Stevens[111] that *Shaffer* will adversely affect real property actions.

The fact that unknown persons may be involved in litigation increases the need for uniform adjudication in a single forum.[112] The Court, having remained loyal to the traditional categories of jurisdiction in *Shaffer*, might be receptive to a systematic accommodation of "true" in rem jurisdiction, so that the entire category need not be dealt with as aberrant or exceptional.

A rigorous requirement that every defendant in a real property action possess minimum contacts with the forum greatly reduces the chance that there will exist at least one forum that can perfect title.[113]

tional nexus with the forum. Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO STATE L.J. 264, 279 (1976). Under the proposed interpretation of *Shaffer*, ante-mortem probate and conventional probate, which both affect the interests of persons unknown or unborn, would be subjected to a standard of "fair play and substantial justice," not "minimum contacts."

107. 433 U.S. at 207-08 (emphasis added).

108. *Id.* at 207.

109. *Id.* n.24.

110. *Id.* at 217 (Powell, J., concurring).

111. *Id.* (Stevens, J., concurring in the judgment).

112. *See, e.g.*, Von Mehren & Trautman, *supra* note 97, at 1153.

113. Even in an action quasi in rem I, a known claimant may not be susceptible to jurisdiction under the minimum contacts test in the forum where the property is located. In those

Ordinarily the dictates of "fair play and substantial justice," if not "minimum contacts," can be reconciled with the need to protect alienability of property and allow land development. The proposed analysis would allow resolution of the conflict created by *Shaffer* without sacrifice of due process protection.

To employ the traditional taxonomy of jurisdiction to harmonize the *Shaffer* Court's pronouncements with its probable intent seems retrogressive, yet the proposed interpretation enjoys several advantages. It is consistent with the Court's desire, evinced in *Shaffer* and other recent cases,[114] to expand due process protection. It eliminates the need to accommodate "difficult" classes of jurisdiction as isolated exceptions or through the use of fictions. It justifies the Court's preservation of the traditional categories of jurisdiction. And, most importantly, it invites a comprehensive and systematic analysis of jurisdiction, so that fairness may be achieved by consideration of the interests of all parties and the forum state, even when purposive contacts are lacking.

V. CONCLUSION

It is now almost twenty years since one commentator suggested

> that the traditional test of jurisdiction be replaced by one which would analyze and balance conflicting interests in order to reach a result consonant with fundamental fairness. This approach . . . would apply one integrated test and would sustain or deny jurisdiction wholly on the weight of the interests involved. These interests should not be derived from the convenience of the parties alone; the interests of the forum state must also be considered.[115]

That statement still expresses the desideratum of state court jurisdiction; it is truly regrettable that the Court has not embraced it wholeheartedly.

Perhaps because it wished to reinforce the significance of *International Shoe*, or possibly to prevent the criteria for jurisdiction from merging completely into the criteria that determine choice of law,[116] the *Shaffer* Court spoke of the "*relationship among* the defendant, the forum, and the litigation"[117] rather than the *interests of* the defendant, the forum, and the plaintiff. Despite the Court's announced intent to adopt an integrated test for state court jurisdiction, the minimum con-

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exceptional cases, as the *Shaffer* Court contemplated, jurisdiction should be allowed if no other forum is available to the plaintiff and the nonresident claimant is not actually put to great inconvenience. 433 U.S. at 211 n.37.

114. *See* cases cited at note 42 *supra.*

115. *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 956 (1960).

116. 433 U.S. at 215.

117. *Id.* at 204 (emphasis added).

tacts standard that the Court appears to have imposed is too restrictive for comprehensive application.

The *Shaffer* Court spoke decisively in rejecting the power theory of jurisdiction over property and redressing the lingering unfairness of the *Pennoyer* rules of quasi in rem jurisdiction. If the state courts proceed to apply the minimum contacts test to jurisdiction in personam and quasi in rem but conduct a broader inquiry into the balance of interests involved in other exercises of jurisdiction, the spirit, and most of the letter, of *Shaffer* will be satisfied.

Melodee Siegel Kornacker